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92-1863

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

LOUIS J. ALIOTA and PAULETTE ALIOTA,
Petitioners

v.

JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS, JOYCE BALL
UNITED STATES OF AMERICA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CASE Nos. 91-3757 and 92-3020

PETITION FOR WRIT OF CERTIORARI OF APPELLEES, LOUIS J. ALIOTA and PAULETTE ALIOTA

Timothy D. McNair, Esquire
(814) 868-8541
VENDETTI, TALARICO and McNAIR
3820 Liberty Street
Erie, PA 16509

Attorneys for Petitioners

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. §2679(d)(2) unconstitutionally expands the jurisdiction of the Federal Courts beyond the jurisdictional limits imposed by Article III, Section 2 of the United States Constitution by expanding the jurisdiction of Federal courts to include cases not within the purview of that Constitutional provision?

2. Whether 28 U.S.C. §2679(d)(2) constitutes a violation of the Doctrine of Separation of Powers by vesting in the executive branch unfettered power to extend the jurisdiction of the Federal Courts to employees of the Federal Government who were not acting on behalf of the government at the time they comitted the tortious acts complained of by Plaintiffs?

3. Whether the panel decision of the Court of Appeals for the Third Circuit misapprehends the intent of 28 U.S.C. §2679(d)(2), in that, in the event of a determination that the defendants were not engaged in the course of their employment at the time of the conduct complained of, jurisdiction of this case, a common law tort action between citizens of the same state implicating no federal statute or treaty, is to be retained by the Federal District Court?

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II. OPINIONS OF OTHER COURTS

The United States District Court for the Western District of Pennsylvania, per Chief Judge Maurice B. Cohill, Jr., filed a memorandum opinion and order dated August 30, 1991, which granted the Plaintiffs' Supplemental Motion for Remand and to Strike Substitution of the United States as a defendant and remanded the case to State Court. This opinion has not been reported.

The United States Court of Appeals for the Third Circuit, per Circuit Judge Alito, filed an opinion dated January 22, 1993, which vacated the decision of the District Court and remanded the case for a redetermination of the scope of employment issue. This opinion is reported at ____ F.2d ____ (3d Cir., 1993)

III. STATEMENT OF JURISDICTION

The Petitioners, Louis J. Aliota, and Paulette Aliota, seek this Honorable Court's review of the judgment rendered by the Court of Appeals for the Third Circuit on January 22, 1993. The Petitioners filed a timely Petition For Rehearing In Banc, which was subsequently denied by Court Order dated February 18, 1993. This Honorable Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254.

The Constitutional Provision and Statute involved in this case are Article III, Section 2 and 28 U.S.C. §2679(d)(2), respectively.

Article III, Section 2 of the United States Constitution provides:

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or what shall be made under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controver-

> sies between two or more states; - between citizens of different states - [and] between citizens of the same state claiming lands under grants of different states.

The statutory provision at issue, 28 U.S.C. §2679(d)(2), states as follows:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the attorney general shall conclusively establish scope of office or employment for purposes of removal.

IV. STATEMENT OF THE CASE

This case originated as a common law tort action filed by the Plaintiffs, Louis J. Aliota and Paulette Aliota, in the Court of Common Pleas for Erie County, Pennsylvania against five individual defendants who were employees of the Veteran's Affairs Medical Center in Erie, Pennsylvania. The action for defamation was commenced in State Court by the filing of a Writ of Summons in accordance with state law. Prior to the filing of a complaint, the action was removed to the United States District Court for the Western District of Pennsylvania upon the United States Attorney's Certification pursuant to 28 U.S.C. §2679(d)(2) that the five defendants were acting within the scope of their federal employment at the time of the alleged tortious conduct. Subsequent to the removal, the District Court ordered the filing of an amended complaint. Thereafter, the United States filed a Notice of Substitution and order dismissing the individual defendants. That order was entered by the Court without opportunity for the Plaintiffs to object.

The Plaintiffs moved pursuant to the authority of *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990) for a hearing regarding the scope of employment issue. In response, the District Court ordered the taking of depositions and the submissions of brief limited to that issue. Upon examining the resultant factual record on August 30, 1991, the District Court, per Maurice B. Cohill, Chief Judge, filed a memorandum opinion and order striking the substitution of the United States as party defendant and remanding the case to state court. The United States filed a Motion to Stay Remand to State Court which was denied by the District Court. The United States filed an appeal to the Court of Appeals for the Third Circuit. The Plaintiffs/Appellees filed a Motion to Quash Appeal to which the Defendants/Appellants filed a response. The Motion to Quash was denied by the Court of Appeals for the Third Circuit and argument was heard on June 25, 1992.

On January 22, 1993, the Court of Appeals for the Third Circuit issued an opinion, per Circuit Judge Alito, which vacated the decision of the District Court and remanded the case for a redetermination whether, in accordance with the procedures and standards set out in the opinion, the originally named individual defendants were acting within the scope of their employment when they allegedly made the defamatory statements. The Court of Appeals for the Third Circuit also held that the Attorney General's certification is conclusive, notwithstanding the potential determination that the defendants were not acting in furtherance of their Federal duties in committing the tort, and that, whatever determination was made by the District Court after full hearing, the case would remain for trial in the Federal Court.

The Plaintiffs/Appellees then filed a timely Petition for Rehearing In Banc before the Court of Appeals for the Third Circuit. In that petition, the same issues that are raised in the instant petition were set forth as well as the argument that the factual findings rendered by the District Court below were reviewable only under the "clearly erroneous" standard of F.R.C.P. 52(a) and that said findings had ample support in the record before the District Court and thus were not clearly erroneous.

V. ARGUMENT

A. THE PANEL DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, A DECISION OF THIS COURT, AND ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

The Third Circuit concluded:

> We conclude that when a tort suit against a federal employee is filed in State Court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the District Court has no authority to remand the case on the ground that the Attorney General's certification is erroneous.
>
> Slip opinion, p. 13.

The panel decision based this conclusion on the language of 28 U.S.C. §2679(D)(2) which states that the Attorney General's certification "shall *conclusively* establish scope of office or employment *for purposes of removal*" (emphasis in opinion). The panel decision further found support in the Third Circuit's decision in *Melo v Hafer*, 912 F.2d 628, 641, setting forth in its opinion (slip opinion, 14) "In that case we held that 28 U.S.C. §2679(d)(2) (1988) does not preclude a district court from resubstituting the original Defendants *for the purpose of trial* if the court concludes after removal that the Attorney General's certification was incorrect." The language of the panel opinion contradicts that court's clear statement in footnote 20, 912 F.2nd at 642, that the district court *must* determine whether the federal employee who was not acting within the scope of his employment may yet have acted under color of his office, providing removal jurisdiction under 28 U.S.C. §1442(a)(1) and adding "the point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment." 912 F.2d at 642, fn.20 The court went on to question whether the district court would have jurisdiction over any of the state law claims included in the federal action filed against Assistant U.S. Attorney West in the absence of some basis for federal jurisdiction.

The Third Circuit's statement in *Melo, supra*, is consistent with the decision of this Court in *Mesa v. California*, 489 U.S. 121 (1989). *Mesa* concerned removal jurisdiction under 28 U.S.C. § 1442(a), and noted that a statute which permits removal [on the basis of Federal employment] of *any* lawsuit filed against a federal employee would be unconstitutional. 489 U.S. at 136-139. The provision relied upon by the panel in this case is just that statute. Although, in its original brief, the Government asserted that the Attorney General's scope certification somehow distinguishes 28 U.S.C. § 2679(d)(2) from a statute which would permit removal only on the basis of employment status, the Government, and the Third Circuit, overlooked the fact that this interpretation of the *Westfall* Act would only narrow the removal jurisdiction, confining it to federal employees who are in the favor of the local U.S. Attorney. As the First Circuit aptly noted in *Nasuti v. Scannell, supra*, "[I]t is hard to imagine Congress empowering an executive officer ... to displace the federal court as the final determiner of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court." 906 F.2d at 812. That court went on to note that the Attorney General was under no constraint to be impartial in his determination or even to conduct an inquiry into the facts underlying the claim. Although these statements were made in the context of review of the scope certification, they apply equally to removal jurisdiction under 28 U.S.C. § 1442(a), which this court clearly left to the determination of the district courts in its decision in *Melo, supra*.

B. THE THIRD CIRCUIT'S INTERPRETATION OF 28 U.S.C.§2679(d)(2) EXPANDS THE JURISDICTION OF THE FEDERAL COURTS BEYOND THE CONFINES OF ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Article III, Section 2 of the United States Constitution provides:

> **Section. 2.** the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

> Laws of the United States, and Treaties made, or what shall be made under their Authority; - to all Cases affecting Ambassadors other public Ministers and Consuls; - to all cases of admiralty and maritime Jurisdiction; - to controversies to which the United States shall be a Party; - to Controversies between two or more states; - between Citizens of different States - [and] between Citizens of the same State claiming Lands under Grants of different States.

... "Congress cannot confer on lower federal courts a jurisdiction beyond the cases to which the judicial power of the United States extends under the Constitution. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No.25, A.F.L. v. W.L. Mead, Inc.*, 230 F.2nd 576 (1st Cir., 1956), *certiorari dismissed* 77 S.Ct. 21, 352 U.S. 802, 1 L.Ed. 2d 37. The basis for removal and substitution arises from an enactment of Congress, one of the "laws of the United States," the Federal Tort Claims Act, which provides for sovereign immunity of the United States and immunity for its employees *only* while engaged in the scope of their employment in furtherance of the business of the United States. When a district court determines that a party does not fall within the protections of the Federal Tort Claims Act, as in this case, where an individual is found to have committed a common law tort not acting within the scope of his employment, there is no independent substantive basis for federal jurisdiction with the possible exception of removal jurisdiction under 28 U.S.C. §1442(a)(1). The issue of whether the defendants were acting "under color of" their federal employment has not been addressed by the district court and the record provides no basis upon which such a determination can reasonably be made. *Mesa, supra*, however, clearly states that removal jurisdiction under 28 U.S.C.§ 1442(a)(1) will only apply where there is a "federal defense" to the conduct alleged. *Mesa, supra*, at 109 U.S. 966. There is no federal defense available to the individual defendants in this case.

The panel's decision in this matter indicates that the district will be required to retain jurisdiction of this matter for trial based solely upon the certification of the Attorney General that the employees were, in fact, acting within the scope of

their employment at the time of the conduct alleged. As set forth in this court's decision in *Melo v. Hafer*, *supra*, and *Schrob v. Catterson*, *supra*, as well as decisions in the 1st Circuit, *Nasuti v. Scannell*, 906 F.2d 802, 7th Circuit, *Snodgrass v. Jones*, 957 F.2d 482 (7th Cir., 1992), 11th Circuit, *Green v. Hill*, 954 F.2d 694 (11th Cir., 1992), *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir., 1990), *cert. denied*, ___ U.S.___, 112 S.Ct. 62, 116 L.Ed.2d 37 (1991) and others, a determination that the scope certification providing the basis for removal from state court is erroneous will lead to a remand to the state court where the case was originally brought.

In *Nasuti*, *supra*, the First Circuit, in its conclusion to the opinion in that case stated: "If the district court finds that Scannell was acting *outside* the scope of his employment, it shall remand the case back to the state's superior court." 906 F.2d at 814 (emphasis in original). Likewise, in *Green*, *supra*, the 11th Circuit Court of Appeals stated, in the final paragraph of its opinion: " If the district court finds that the assault and battery occurred within the scope of Hill's employment, it must dismiss this case. If it finds that the acts occurred outside the scope of employment, it must remand the case to state court for the claim of assault and battery against Hill to proceed." 954 F.2d at 698, citing *S.J. & W. Ranch*, *supra*. Likewise, in footnote 20 to the *Melo* opinion, *supra*, this court stated clearly that, on remand, the district court *must* rule on the Plaintiff's Motion for Remand, 912 F.2d at 642, indicating that, contrary to the panel's opinion in this case, there is no place for a state law claim between two private citizens which does not implicate any law or interest or interest of the United States in federal court.

The judicial power of the federal courts is defined and circumscribed in Article III, Section 2 of the United States Constitution. A comparison of this case against the limitations set forth in that section of the Constitution indicates clearly that the jurisdiction of the federal courts shall not extend to a common law tort action between citizens of the same state. There is no provision in Article III, Section 2 which could be applied to this case if, on remand, the district court again concludes that the Defendants were not acting within the scope of their employment such as would permit the

district court to proceed with trial. Clearly, trial would be a hollow exercise in a court which did not have constitutional jurisdiction to enter a valid judgment.

The panel interprets 28 U.S.C. §2679(d)(2) to require the case to remain in federal court for trial even if the individual Defendants are properly found to have acted outside the scope of their employment. Since the Federal Tort Claims Act, 28 U.S.C. §2671(c), applies only to torts committed by federal employees "while in the scope and course of their employment," 28 U.S.C. § 2672, the F.T.C.A. does not provide a jurisdictional basis for the remaining action between Plaintiff and the individual Defendants who are found to have acted outside the scope of their employment.

In the scenario set forth above, the district court would not apply the F.T.C.A. pursuant to 28 U.S.C. §2679(d), the only arguable basis for federal court jurisdiction would be the last sentence of §2679(d)(2) which states: "The certification of the Attorney General shall be conclusive *for purposes of removal*" (emphasis added). The effect of this curious language has ben debated in many courts, as set forth above, and the interpretation given that language by the panel of this court has been specifically rejected by various circuit courts for the very reason that the application suggested in this case would constitute an obvious violation of the doctrine of separation of powers, and would unconstitutionally expand the jurisdiction of the Federal courts.

The 1st Circuit held in *Nasuti v. Scannell*, *supra*, "While Congress provided that the Attorney General's certification conclusively establishes scope of employment for *removal purposes*, we do not construe this as abolishing the district court's normal power to determine the scope question finally where necessary to resolve disputed rights and the court's own subject matter jurisdiction." 906 F.2d at 808 (emphasis in original). The First Circuit went on to say, "indeed, there might be separation of powers question if the statute were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court." 906 F.2d at 813. The First Circuit found that while the "scope certification must be given conclusive effect for purposes of removal, that conclusive effect lasts only until the court

speaks on the specific scope issue." 906 F.2d at 813, fn.16. Likewise, the Eleventh Circuit in *S.J. & W. Ranch, Inc., supra*, stated: "[S]eparation of Powers concerns generally bar executive branch interference in the judicial branch's determination of its subject matter jurisdiction." citing *Nasuti, supra*, 906 F.2d at 813, and *Gogek v. Brown Univ.*, 729 F. Supp. 926 (D.R.I. 1990). *See also, Mesa, supra.*

The position of the United States in this matter is that the case should remain pending in the district court notwithstanding the lack of any substantive basis for federal court jurisdiction. This denies the Plaintiffs their choice of forum and, in particular, denies the Plaintiffs the benefits of the state court forum which, in this case, are numerous. Petitioners assert that this court can take judicial notice of the backlog of civil cases in the district courts of Pennsylvania as well as the reasons for that backlog which have been frequently been discussed in opinions of this court and others. This backlog will, if the district court is burdened with this case, delay plaintiffs in the resolution of this case. Further, under the Pennsylvania Rules of Civil Procedure, Plaintiffs are entitled with leave of court to engage in discovery prior to the filing of the complaint. In fact, it was specifically to take advantage of that procedure that procedure that Plaintiffs commenced this action in the state court by the issuance of a Writ of Summons. A reasonable inference is that the case was removed specifically in order to prevent investigation of Plaintiff's state law claim. This pre-filing discovery procedure is often utilized in cases where the factual basis and merit are difficult to determine since the opposing parties are not often forthcoming, and there does not exist an impartial investigation by a neutral investigator. This procedure allows a Plaintiff to institute an action without filing a complaint, investigate it for merit and for purposes of preparing a specifically factual complaint as required under the Pennsylvania Rules, or to determine that the case is without merit and dismiss it without proceeding further and without being required to put potentially damaging allegations on the record. Although some of these concerns are obviated by the application of the more liberal pleading rules under the Federal Rules of Civil Procedure, Plaintiffs at no time prior to the issuance of the writ

suspected that there was any ground for federal jurisdiction in this matter. Plaintiffs have still not been permitted to fully investigate this matter. Permitting the executive branch to place this matter into federal court based upon the arguably improper scope certification was calculated to and, will in fact deny Plaintiffs their choice of forum. Assuming that the district court finds that the scope certification was erroneous, the government still maintains, and the panel agreed, that the district court should be burdened with yet another case for trial, this one bearing the unique pedigree of being nothing more than a common law tort action between individual citizens of the same state.[1]

VI. CONCLUSION:

It is incumbent upon the Supreme Court to intercede pursuant to its supervisory authority to consider the Third Circuit's instant interpretation of a basic jurisdictional procedure under the Westfall Act that will permit complete executive branch discretion in establishing federal court jurisdiction. It is evident that other circuit courts have not provided that same unfettered discretion and the decision of the Supreme Court in *Mesa v. California, supra*, dictates that a removal statute is insufficient to support jurisdiction under Article III of the constitution where no federal defense is implicated. This is such a case where the Attorney General's certification is prospectively found to be in error. Moreover, if the panel decision of the Third Circuit remains unchallenged, the fundamental jurisdictional provisions of Article III, Section 2 of the Constitution will be compromised. The Petitioners

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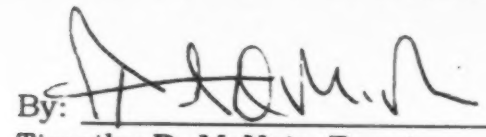
[1] It is undisputed and, the Government has admitted in pleadings that all of the individual defendants were citizens of the state of Pennsylvania at the time of the conduct complained of.

respectfully request this Honorable Court to maintain uniformity of decisions within the respective circuits and retain adherence to the clear mandate of *Mesa v. California, supra.*

Respectfully submitted,

VENDETTI, TALARICO & McNAIR



By: _____

Timothy D. McNair, Esquire
Attorneys for Petitioners
3820 Liberty Street
Erie, Pennsylvania 16509
(814) 868-8541
PA ID # 34304

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UNITED STATES SUPREME COURT

No.

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Timothy D. McNair, Esquire
(814) 868-8541
VENDETTI, TALARICO and McNAIR
3820 Liberty Street
Erie, PA 16509

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOUIS J. ALIOTA and

PAULETTE ALIOTA,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 90-244E

MEMORANDUM OPINION

COHILL, Chief Judge.

Presently before us is a Supplemental Motion for Remand and to Strike Substitution of the United States as a Defendant filed by plaintiffs Louis J. and Paulette Aliota. For the following reasons, we hold that the original defendants were not acting within the scope of their employment and therefore, we do not have jurisdiction under the Federal Employees Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679. We will remand this case to the Court of Common Pleas of Erie County.

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Facts

This defamation action arose from the following incident described in the Complaint: one work day, Kathryn Fowells, a pharmacist at the Veterans Affairs Medical Center in Erie, Pennsylvania ("Erie VA Medical Center"), allegedly said something to one Tim Nies, a pharmaceutical company representative, to the effect that Mr. Aliota had been removed from his duties as a registered pharmacist at the Erie VA Medical Center due to his involvement in a "drug scandal." Complaint, ¶ 9. The Complaint states that it was Jack D. Graham, Director of the Erie VA Medical Center, and William D. Shoemake, Associate Director of the Erie VA Medical Center, who supplied this "gossip" to Kathryn Fowells. Complaint, ¶¶ 11, 12. The Complaint further asserts that Messrs. Graham and Shoemake intentionally conspired to circulate those rumors, knowing them to be false. Complaint, ¶¶ 11-12. Janet Wells is a pharmacist and Joyce Bell is a pharmacy technician at the Erie VA Medical Center. Notice of Removal, ¶¶ 6-7. The VA Medical Center employees were original

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defendants in this action.

On September 24, 1990, plaintiffs commenced this action by the filing of a Praecipe for Issuance of Writ of Summons in the Court of Common Pleas of Erie County, Pennsylvania, at No. 4116-A-1990.

On October 6, 1990, the government removed this case to this Court based on 28 U.S.C. § 2679 which provides that a tort case against a federal employee can be removed from state to federal court upon certification by the Attorney General that the employee was acting within the scope of his or her employment. The plaintiff subsequently filed the Complaint. After that, plaintiffs filed a Motion to Remand for Failure to Comply with 28 U.S.C. § 2679, asserting that the Attorney General had failed to certify that the Erie VA Medical Center employees were acting within the scope of their employment.

On December 17, 1990, the original defendants Jack D. Graham, William D. Shoemake, Kathryn Fowells, Janet Wells, and Joyce Ball, filed a Notice of Substitution of the United States as a Defendant. Attached with that notice

was a Certification of Scope of Employment signed by Thomas W. Corbett, Jr., United States Attorney for the Western District of Pennsylvania, acting as a designate of the Attorney General, certifying that the Erie VA Medical Center Employees were acting within the scope of their employment as employees of the United States.

On December 26, 1990, this Court entered an Order approving the substitution. The United States then filed a motion to dismiss. This Court then entered an Order on March 27, 1991, denying plaintiffs' Motion to Remand for Failure to Comply with 28 U.S.C. § 2679 as being moot since the Certification of Scope of Employment had been filed.

On April 17, 1991, plaintiffs filed Supplemental Motion for Remand and to Strike Substitution of United States as a Defendant. Pursuant to plaintiffs' request, we scheduled an evidentiary hearing with respect to that motion on May 29, 1991. At the hearing, plaintiffs requested leave to take the depositions of the original defendants, and the government re-

quested leave to take the plaintiffs' depositions. That same day, this Court entered a written order outlining the discovery parameters.

Now for our determination is the issue of whether the original defendants were acting within the scope of their employment with respect to the incident concerning Mr. Aliota.

Discussion

Title 28 U.S.C. § 2679 was enacted to provide federal employees absolute immunity for activities within the scope of their employment. Melo v. Hafer, 912 F.2d 628, 639 (3d Cir. 1990), cert. granted, 112 L.Ed.2d 1176 (1991). The provision at issue establishes:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office of employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed...to the district court. ...Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the

> Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2). In Melo v. Hafer, 912 F.2d at 642, the Court of Appeals for the Third Circuit held that a district court may review the government's certification that the actions of the defendants were within the scope of their employment. We reviewed the Petition for Writ of Certiorari and all other pleadings that were filed with the United States Supreme Court in the Melo v. Hafer case. The issue of whether the United States Attorney's determination that employees were acting within the scope of their employment is subject to review was not raised.

The government suggests that before we can reach the scope of employment issue, plaintiffs must first prove that there were defamatory statements made. We disagree because this issue is the very substance of the case. In this Memorandum Opinion we are merely concerned with the scope of employment which will or will not give this Court's jurisdiction pursuant to Federal Employees Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679.

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Plaintiffs do, however, bear the burden of proving that the employee's conduct was not encompassed by the scope of employment. S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir, 1990), reh'g denied en banc, 925 F.2d 1477 (11th Cir. 1991). Whether an employee's actions are within the scope of employment for purposes of 28 U.S.C. § 2679 is governed by the law of the state where the incident occurred. Id. at 1542.

Pennsylvania courts have adopted § 228 of the Restatement (Second) of the Agency to define scope of employment:

> (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of the force is not unexpectable by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve that matter.

See Butler v. Flo-Ron Vending Co., 383 Pa. Super. 633, 557 A.2d 730 (Pa. Super. 1989), appeal

denied 523 Pa. 646, 567 A.2d 650 (1989).

In applying § 228, we find that the Erie VA Medical Center employees were not acting within the scope of their employment. We recognize that the alleged incident took place during the work day on the premises of the Erie VA Medical Center. We must, however, examine the other aspects of § 228.

The alleged statements relative to § 228(1)(a), if made, clearly fall outside the scope of employment. The plaintiff alleged that Messrs. Graham and Shoemake informed Ms. Fowells, who, in turn, informed Tim Nies, that Mr. Aliota was involved in a "drug scandal." These do not comprise tasks that those original defendants were required to perform. In considering Ms. Fowells' job description as a pharmacist, it provides that "Contacts include patients, Allied Health Care personnel, manufacturer representatives, private physicians and other VA employee" and that the purpose of the contacts is the "Factual exchange of information, offer recommendations to provide service, to resolve problems and to offer the

best possible information in the application of pharmaceutical expertise." Pakutz Aff., ex. B, p. 4. The allegations of this lawsuit do not state that the original defendant passed on factual information. This case is a defamation action! Therefore, we conclude the alleged conduct of the individual defendants was not conduct that they were employed to perform.

With respect to § 228(1)(c), the individual defendants were obviously not motivated by a purpose to serve the interests of the Erie VA Medical Center. Indeed, Mr. Graham informed the employees to refer questions about Mr. Aliota to Mr. Graham, because the incident "was nobody's business." Deposition of Joyce Ball, p. 29. See also Deposition of Kathryn Fowells, p. 37. The alleged incident was contrary to the direction Mr. Graham, so it is clear that it was not for the purpose of serving the interests of the Erie VA Medical Center.

Our conclusion is supported by a comparison of this case to two other cases that the government cites. In Michelson v. Exxon Research and Engineering Co., 629 F.Supp. 418,

422 (W.D.Pa. 1986), aff'd, 808 F.2d 1005 (3d Cir. 1987), the court held that the agents of the defendant corporation were acting within the scope of their employment with respect to a memorandum that one of its employees wrote. In that case, plaintiff William L. Michelson, a materials inspector of Exxon, was assigned to conduct a locomotive inspection. Those present at the inspection included various Exxon trainees and officials and one Gustavo Arias, an employee of Carbocol. Mr. Arias was not impressed by plaintiff's actions and attitude at the inspection, so he telephoned J.P. Kelly, an Exxon employee and complained. Mr. Kelly documented the phone conversation in a memorandum which was sent to his superiors at Exxon. The memorandum stated that Mr. Arias criticized plaintiff for his lack of knowledge about locomotive, his attention to minor details, and his "arrogant attitude." The memorandum also noted that, not being present, Mr. Kelly could not verify the accuracy of Mr. Arias' statements.

In that case the Court stated that there was

no doubt that defendant's agents were acting within the scope of their authority in their actions regarding the Kelly memorandum. Id. at 422. "The memo is from an employee to other employees concerning the performance of a third employee in transacting company business." Id.

Additionally, in Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979), Chuy was a professional football player with the Philadelphia Eagles. The Philadelphia Eagle's team physician, Dr. James Nixon, made a statement to the press to the effect that Chuy was suffering from a fatal disease, while he allegedly knew the statement to be false. The court determined that Dr. Nixon was acting within the scope of his employment because the Philadelphia Eagles had the right to control, and actually did control, the substance of Dr. Nixon's statements to the press concerning the physical condition of the team's players. Id. at 1276.

The case at issue, in comparison, involved alleged gossip-spreading and character-smearing which are definitely not tasks that the Erie

VA Medical Center Employees were authorized to or employed to perform. We therefore conclude that the original defendants were not acting within the scope of their employment and therefore, this Court does not have jurisdiction. We will remand this case to the Court of Common Pleas of Erie County.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Chief Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOUIS J. ALIOTA and

PAULETTE ALIOTA,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 90-244E

ORDER

AND NOW, to-wit, this 30th day of August, 1991, for the reasons stated in the foregoing Memorandum Opinion, it is ORDERED. ADJUDGED, and DECREED that Plaintiffs' Louis J. and Paulette Aliota's Supplemental Motion for Remand and to Strike Substitution of the United States as a Defendant be and hereby is GRANTED. Accordingly, this case be and hereby is REMANDED to the Court of Common Pleas of Erie County, Pennsylvania.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Chief Judge

AIS

cc: Timothy D. McNair, Esq.
Bifulco, Bender, Scarpitti,
Moore & McNair
1300 Baldwin Bldg.
Erie, PA 16501

Pamela J. Grimm
Assistant United States Attorney

AJS

Filed January 22, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3757 and 92-3020

LOUIS J. ALIOTA and PAULETTE ALIOTA,

v.

JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS, JOYCE BALL,
UNITED STATES OF AMERICA,
Appellants in No. 91-3757

IN RE: UNITED STATES OF AMERICA,
JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS and
JOYCE BALL,
Petitioners in No. 92-3020

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 90-00244E)

Argued
June 25, 1992
Before: BECKER, HUTCHINSON, and ALITO,
Circuit Judges

(Opinion Filed: January 22, 1993)

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THOMAS W. CORBETT, JR.
United States Attorney
BONNIE R. SCHLUETER
Office of United States Attorney
633 United States Post Office &
Courthouse
Pittsburgh, PA 15219

STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
Civil Division
MALCOLM L. STEWART (Argued)
ROBERT V. ZENER
CHRISTINE N. KOHL
Appellate Section
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530

Attorneys for Appellants/Petitioners

TIMOTHY D. McNAIR, ESQ. (Argued)
VENDETTI, TALARICO and McNAIR
3820 Liberty Street
Erie, PA 16509

Attorneys for Appellees/Respondents

OPINION OF THE COURT

ALITO, *Circuit Judge*:

The United States has appealed and has filed a mandamus petition seeking review of a district court order in a defamation action that was originally begun in state court against five federal

employees in their individual capacities. After the case was removed to federal court and the United States was substituted for the original defendants pursuant to a provision of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679(d)(1988), the district court resubstituted the original defendants and remanded the case to state court. We hold that the district court's resubstitution decision is appealable under the collateral order doctrine; that the remand was prohibited by 28 U.S.C. § 2679(d)(2)(1988) and is reviewable by mandamus; and that the district court applied incorrect legal standards in concluding that the originally named individual defendants were not acting within the scope of their employment when they allegedly engaged in the conduct in question. We will therefore vacate the order of the district court and remand for further proceedings.

I.

Louis J. Aliota served as chief of the pharmacy at the Veterans Affairs Medical Center in Erie, Pennsylvania, from 1980 until 1989. In 1989, Aliota was relieved of his duties as chief of the pharmacy and placed in another position.

In October 1990, Aliota and his wife began a civil action in the Court of Common Pleas for Erie County against five employees of the Medical Center. These individuals are Jack D. Graham, the director of the Medical Center; William D. Shoemake, the associate director of the Medical Center; and Joyce Ball, Kathryn Fowells, and Janet Wells, three other Medical Center employees. The plaintiffs subsequently served a motion stating

that their suit was based on slander and conspiracy arising from statements made by the defendants during September and October 1989.

Represented by the Department of Justice, the defendants filed a notice of removal to the United States District Court for the Western District of Pennsylvania. In that notice, counsel for the defendants stated:

> Plaintiffs' counsel represented to undersigned counsel in a telephone conversation . . . that the allegedly slanderous statements at issue were made by defendants at the Erie VA Medical Center to a pharmaceutical company representative in the course of that representative's regular business visit to the Erie VA Medical Center.
>
> . . . Plaintiffs' cause of action, if any, appears to arise from actions taken by defendants in the course of their employment and, therefore, is subject to federal jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2679.

The plaintiffs subsequently filed a complaint in the federal court, alleging that "[o]n or about September 23, 1989, Defendant Kathryn Fowells made statements to one Tim Nies to the effect that Plaintiff Louis J. Aliota had been removed from his duties due to his involvement in a 'drug scandal'." The complaint further alleged that "Defendants Jack D. Graham and William D. Shoemake communicated the aforementioned defamatory statement to Kathryn Fowells with knowledge that it was false and with the intent to injure Plaintiff in his reputation." The complaint did not contain

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any specific allegations concerning the remaining defendants.

The United States Attorney for the Western District of Pennsylvania, exercising authority delegated by the Attorney General of the United States, certified that the five individual defendants were acting within the scope of their employment when they allegedly engaged in the conduct in question. The district court then ordered that the United States be substituted as the sole defendant and that the claims against the individual defendants be dismissed.

The plaintiffs subsequently filed a motion to remand the case and to strike the substitution of the United States as the defendant, arguing that the individual defendants had not been acting within the scope of their employment. At an evidentiary hearing on this motion, both sides requested leave to take depositions. The court granted these requests, and after the depositions were completed, the court held that none of the defendants had been acting within the scope of their employment when they allegedly made the defamatory statements. The court therefore entered an order striking the substitution and remanding the case to the state court. The United States filed a notice of appeal, as well as a petition for mandamus seeking review of the remand.

II.

We first address the question whether the portion of the district court's order resubstituting the originally named defendants in place of the United States is reviewable by means of an appeal filed under 28 U.S.C. § 1291 (1988). This question may be divided into two subquestions: first,

whether review of this portion of the district court's order is barred by 28 U.S.C. § 1447(d) (1988), which restricts review of remand orders, and second, whether this portion of the district court's order is "final" within the meaning of 28 U.S.C. § 1291 (1988).

A. We hold that review of the question of resubstitution is not barred by 28 U.S.C. § 1447(d)(1988). This provision concerns appellate review of "[a]n order remanding a case to the State court from which it was removed. . . ." 28 U.S.C. § 1447(d)(1988). This provision says nothing about orders directing the resubstitution of parties. Accordingly, unless the question of resubstitution is viewed as somehow inextricably linked to the question of remand, 28 U.S.C. § 1447(d)(1988) does not bar review.

The Supreme Court considered a closely related issue in *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934). In *Waco*, the district court in a removed case issued a single order that dismissed a cross-claim and remanded the case to the state court for lack of diversity jurisdiction. The Supreme Court held that the portion of the district court's order dismissing the cross-claim was appealable despite the restriction on appellate review of remand orders contained in the statutory predecessor of 28 U.S.C. § 1447(d)(1988).[1] The Supreme Court wrote (*id.* at 143):

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the

1. Judicial Code of 1911, ch. 3, § 28, 36 Stat. 1094, 1095 (1911).

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> District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

See also In re TMI Litigation Cases, 940 F.2d 832, 841-42 (3d Cir. 1991), *cert. denied*, *Gumby v. General Pub. Utils. Co.*, 112 S. Ct. 1262 (1992).

Applying this reasoning, we conclude that review of the question of resubstitution in the present case is not barred by 28 U.S.C. § 1447(d)(1988). This question is separate from and logically precedes the question of remand. We note that the Fifth Circuit reached the same conclusion in *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990).

B. We also hold that the order of the district court, insofar as it resubstituted the originally named defendants, was "final" within the meaning of 28 U.S.C. § 1291 (1988) because it fell within the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In order to fall within this exception to the general finality requirement, "[t]he order must conclusively determine the disputed question, resolve an important issue [that is] completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *See also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985). In addition, the order must involve a claim of right that is "too important to be denied review." *Cohen*, 337 U.S. at 546.

We believe that the district court's decision concerning the resubstitution question in this case

satisfies all of these requirements. First, the district court's determination represented its final word on the resubstitution. Second, the question of resubstitution is completely separate from the merits of the defamation action. Third, the district court's decision that the individual defendants should be resubstituted would be effectively unreviewable on appeal from a final judgment. Such is the case when an order involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (footnote omitted). *See also Lauro Lines*, 490 U.S. at 498-99. The denial of a government official's motion to dismiss an action based upon a claim of absolute immunity is effectively unreviewable on appeal from a final judgment because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Forsyth*, 472 U.S. at 525. An order granting resubstitution effectively denies a federal employee's claim to absolute immunity. As we recognized in *Melo v. Hafer*, 912 F.2d 628, 639 (3d Cir. 1990), *aff'd*, 112 S. Ct. 358 (1991), the primary purpose of the Westfall Act was to ensure that federal employees enjoyed "a status of absolute immunity for activities within their scope of employment." *See also Schrob v. Catterson*, 967 F.2d 929, 934 (3d Cir. 1992). It therefore follows, in our view, that a resubstitution order, like an order denying a claim of absolute immunity, is effectively unreviewable on appeal from a final judgment.[2]

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2. In addition, an order denying "a substantial claim of

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In *Mitchell v. Carlson*, the Fifth Circuit held that a resubstitution order is appealable under the "collateral order" doctrine and reasoned as follows: (896 F.2d at 133):

> The district court's order resubstituting [a federal employee] as defendant effectively denied [her] immunity from suit if she was entitled to such immunity under the Westfall Act. Under the Act, once the United States Attorney certifies that the federal employee acted within the scope of her employment, the plaintiff properly can proceed only against the United States as defendant. The federal employee remains immune from suit. By reviving the suit against her, the district court subjected [her] to the burden of defending a suit in state court, a burden from which she is entitled to be immune.

We agree with this reasoning and thus hold that the resubstitution order is appealable under the collateral order doctrine.[3]

III.

A. We now come to the most difficult question in this case, i.e., whether the order of remand is reviewable despite the restriction imposed by 28 U.S.C. § 1447(d)(1988). With certain specified exceptions not pertinent here, this provision states:

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absolute immunity" is too important to be denied immediate review. *Forsyth*, 472 U.S. at 525.

3. We note that our recent opinion in *Schrob*, 967 F.2d at 936, stated that "[i]n the event that a substitution is set aside, the defendant may probably appeal under the collateral order doctrine."

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> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .

While this language is "seemingly unequivocal," it has been held to permit "appellate consideration of certain categories of remand orders." *In re TMI*, 940 F.2d at 841. Most notably, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Supreme Court held that 28 U.S.C. § 1447(d)(1970), did not preclude the court of appeals from reviewing by means of mandamus an order of the district court remanding a removed case solely because of the district court's crowded docket. The Supreme Court held that 28 U.S.C. § 1447(d) (1970), had to be read together with 28 U.S.C. § 1447(c) (1970), which required a district court to remand a case if it appeared that the case had been "removed improvidently and without jurisdiction."[4] "This means," the Supreme Court then reasoned (423 U.S. at 346), "that only remand orders issued under § 1447(c) and invoking the grounds specified therein – that removal was improvident and without jurisdiction – are immune from review under § 1447(d)." The Court added (*id.* at 351): "[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seemed justifiable to them" but were not legally permissible. Because a crowded district court docket was not a permissible ground for remand,

4. 28 U.S.C. § 1447(c) (1988) now provides that a case must be remanded if "it appears that the district court lacks subject matter jurisdiction."

the Court held that the remand order in that case was reviewable.

Based on similar reasoning, we have held that a variety of remand orders are reviewable. *See In re TMI*, 940 F.2d at 838-48; *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1210-11 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65-66 (3d Cir. 1989); *Hewlett v. Davis*, 844 F.2d 109, 115 (3d Cir. 1988); *Levy v. Weissman*, 671 F.2d 766, 768-69 (3d Cir. 1982). *But see Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (*Thermtron* does not apply where district court remands based on statutory grounds even if it employs erroneous principles in reaching its conclusion).

B. In order to apply the teaching of *Thermtron* to the present case, it is necessary to understand the background of the Westfall Act and its provisions relating to the removal of actions filed in state court.

Before the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), the United States took the position that federal employees were absolutely immune from suits for damages under state tort law whenever their conduct fell within the scope of their official duties. *See id.* at 296. In *Westfall*, however, the Supreme Court held that this immunity applied only to conduct that was discretionary in nature. *Id.* at 300. At the same time, the Court observed (*id.*):

> Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal

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employees involved in state-law tort actions would be useful.

Congress quickly responded by enacting the *Westfall* Act. As we explained in *Melo v. Hafer*, 912 F.2d 628, 639 (3d Cir. 1990), *aff'd*, 112 S. Ct. 358 (1991):

> The primary purpose of [the Westfall Act] was "to return Federal employees to the status they held prior to the *Westfall* decision," that is, a status of absolute immunity for activities within their scope of employment. *See* H.R. Rep. No. 100-700, 100th Cong., 2d sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5947. . . .

In the Federal Torts Claims Act, Congress consented to suits against the United States for certain torts committed by federal employees "while acting within the scope of [their] office or employment." 28 U.S.C. § 2672 (1988 & Supp. II 1990). Under 28 U.S.C. § 2679(b)(1) (1988), this remedy "is exclusive of any other civil action or proceeding for money damages . . . arising out of or relating to the same subject matter against the employee or the employee's estate."

Whenever such an action is filed against a federal employee, the Department of Justice must provide representation. 28 U.S.C. § 2679(c) (1988). If the action is commenced in federal court and the Attorney General certifies that the employee was acting within the scope of his or her office or employment at the time in question, the United States must be substituted as the defendant. 28 U.S.C. § 2679(d)(1)(1988). If the action is commenced in state court and the Attorney General makes a similar certification, the action

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"shall be removed without bond at any time before trial by the Attorney General" to the appropriate district court, and the United States must then be substituted as the defendant. 28 U.S.C. § 2679(d)(2)(1988). Moreover, this provision states that "[t]his certification of the Attorney General *shall conclusively establish scope of office or employment for purposes of removal.*" *Id.* (emphasis added).

If the Attorney General refuses to certify that an employee was acting within the scope of the employee's office or employment, a different procedure is followed. The employee may petition the court to make such a certification. 28 U.S.C. § 2679(d)(3)(1988). If the case was filed in state court, the Attorney General may remove it without bond to the appropriate district court. *Id.* If the district court, in considering the petition, determines that the employee was not acting within the scope of the employee's office or employment, the case must be remanded. *Id.* If the district court holds that the employee was acting within the scope of the employee's office or employment, the United States must be substituted as the defendant. *Id.*

From this statutory scheme, we conclude that when a tort suit against a federal employee is filed in state court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous. We believe that this conclusion is dictated by the plain language of 28 U.S.C. § 2679(d)(2)(1988) stating that the Attorney General's certification "shall

conclusively establish scope of office or employment *for purposes of removal*" (emphasis added).

This conclusion is also supported by our opinion in *Melo*, 912 F.2d at 641. In that case we held that 28 U.S.C. § 2679(d)(2)(1988) does not preclude a district court from resubstituting the original defendants *for the purpose of trial* if the court concludes after removal that the Attorney General's certification was incorrect. *See* 912 F.2d at 639-42. We strongly suggested, however, that the Attorney General's certification is conclusive *for the purposes of establishing a forum* in which the case would proceed. We stated (*id.* at 641) (emphasis added) that "[t]here are significant policy reasons why Congress would choose to give the government *an unchallengeable right to have a federal forum* for tort suits brought against its employees," but we found "no suggestion in [the Westfall Act] that *once the federal forum has been secured*, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable."

Furthermore, if the portion of 28 U.S.C. § 2679(d)(2) quoted above allowed a district court to remand a removed action on the ground that the Attorney General's certification was erroneous, this language would be essentially meaningless. The Attorney General's certification would not "conclusively establish scope of office or employment" for any purpose – not for purpose of trial or removal. The Attorney General's scope certification would simply provide a temporary basis for removal until the district court reviewed it. This would mean that a state case in which the Attorney General certified scope of employment

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and removed the case under 28 U.S.C. § 2679(d)(2)(1988) would be treated in essentially the same way as a state case in which the Attorney General refused to certify scope of employment but removed the case following an employee's petition for court certification under 28 U.S.C. § 2679(d)(3)(1988). We are convinced that the language of 28 U.S.C. § 2679(d)(2)(1988) was not intended to give the Attorney General's scope certification such a limited effect.[5]

C. In light of the statutory scheme set out above, we hold that review of the remand in this case is not barred by 28 U.S.C. § 1447(d)(1988). Just as the Supreme Court in *Thermtron* held that 28 U.S.C. § 1447(d)(1970) must be read together with 28 U.S.C. § 1447(c)(1970), we hold that 28 U.S.C. § 1447(d)(1988) must be read together with 28 U.S.C. § 2679(d)(2)(1988). This latter,

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5. In *Schrob v. Catterson*, 967 F.2d 929, 934 n.8 (3d Cir. 1992), we stated, citing *Snodgrass v. Jones*, 957 F.2d 482, 484 (7th Cir. 1992), that "it may well be that a case may be remanded to the state court if it is later determined that the employee had not been acting within the scope of employment." In *Snodgrass*, the action was first removed and then remanded to the state court prior to the enactment of the Westfall Act. *See* 957 F.2d at 484. The Attorney General then refused to certify scope of employment, but the employee petitioned for court certification, and the United States removed this petition to federal court under 28 U.S.C. § 2679(d)(3)(1988) (957 F.2d at 484). The district court then held that the employee was not acting within the scope of employment, and the court of appeals affirmed. In light of *Snodgrass*, our footnote in *Schrob* must be understood to mean that a removal case may be remanded when the Attorney General refuses to certify scope of employment, the removal occurs after the employee petitions for court certification, and the court holds that the employee was not acting within the scope of his or her employment.

subsequently enacted provision expresses Congress's intent that subject matter jurisdiction is conclusively established upon the Attorney General's certification. Since subject matter jurisdiction has been conclusively established, there is no jurisdictional question to be resolved by the district court. "Because the District Court remanded a properly removed case *on grounds that he had no authority to consider*, he exceeded his statutorily defined powers; and issuance of the writ of mandamus was not barred by § 1447(d)." *Thermtron*, 423 U.S. at 351 (emphasis added).

The decision here stands in marked contrast to the normal jurisdictional decisions made in connection with remand. Normally, the district court will be called upon by the relevant statute to make a preliminary determination, such as whether there is complete diversity, that will in turn determine whether or not there is jurisdiction. In the present case, however, there is no preliminary determination for the district court to make. Thus the present case falls outside of the type of cases § 1447(d) was intended to cover. *See In re TMI*, 940 F.2d at 844 (noting that the constitutional decision at issue there was different from the normal remand decision (existence of diversity or a federal question) that involved reference to a well-established body of law); *see also Id.* at 845-46 (discussing the jurisprudential concerns associated with the inability to review a constitutional decision).

It does not follow from our decision that anytime the district court misinterprets a jurisdictional statute we have authority to review the remand decision. *See, e.g., Gravitt v. Southwestern Bell Tel. Co., supra.* Such an exception would obviously

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swallow the rule. Here, however, Congress, by expressly stating that the attorney general's certification is "conclusive" as to jurisdiction, has prohibited a district court from using its disagreement with the attorney general's scope of employment certification to deny jurisdiction and so send the case back to the state court where it originated. Thus, our holding is limited to the narrow situation where the district court has relied on a factor in its jurisdictional analysis that Congress intended to exclude from consideration of the jurisdictional issue. Only in that narrow class of cases, in order to give meaning to the legislative prohibition against the district court's considering a particular factor in its jurisdictional analysis, can we imply congressional intent to authorize appellate review of a remand order.

For these reasons, we believe that we are not barred by 28 U.S.C. § 2679(d)(2) from reviewing the remand order in this case. Moreover, we believe that mandamus is appropriate to prevent a remand based on the prohibited ground on which the district court relied. *See, e.g., Thermtron*, 423 U.S. at 352-53. In the words of the First Circuit in *Nasuti v. Scannell*, 906 F.2d 802, 811 (1st Cir. 1990) (footnote omitted), "the district court's remand order was a departure so lacking in statutory basis, and so clearly contrary to Congressional policy as expressed in the Westfall Act, as to require our review by mandamus."[6]

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6. In *Nasuti*, the district court had remanded a removed case despite the Attorney General's scope certification without determining whether the individual defendants had in fact acted within the scope of their employment. The court of

IV.

This brings us to the question whether the district court was correct in concluding that the originally named defendants were not acting within the scope of their employment when they allegedly defamed the plaintiffs. In our second opinion in *Schrob*, 967 F.2d at 934-36, which was handed down well after the district court's decision in this case, we explained the procedures that a district court should follow in deciding a question of this type. We wrote that the Attorney General's scope certification is prima facie evidence that the employee's challenged conduct fell within the scope of employment and that a plaintiff challenging the certification therefore has the burden of coming forward with specific facts rebutting it. *Id.* at 936. We added (*id.*):

> If the facts can be determined without an evidentiary hearing, the court can rule on a pretrial motion to substitute or to set aside the substitution based on the certification, pleadings, documentary evidence, and affidavits. . . . On the other hand, if there is a genuine issue of fact material to the scope of employment question, the district court should permit discovery and conduct a hearing, if necessary. But the district court should ensure that both the discovery and the hearing are circumscribed as narrowly as

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appeals held that this remand order was reviewable, but the court went on to state that review would not be available if the district court, prior to remanding the case, had determined that the employees had not been acting within the scope of their employment. For the reasons explained above, we disagree with this latter conclusion.

possible, although these are matters within its discretion.

From this discussion, it follows that our standard of review in an appeal concerning resubstitution must vary depending on the procedure that the district court follows. If the district court decides the question of scope of employment based on the pleadings or affidavits, we must apply the standard of review applicable to a dismissal under Fed. R. Civ. P. 12(b)(6) or 12(c) or the standard applicable to an order granting summary judgment. On the other hand, if the court decides disputed questions of material fact after conducting an evidentiary hearing, the court's findings must be accepted unless clearly erroneous. *See* Fed. R. Civ. P. 52(a). No matter which procedure the district court follows, however, the question whether an employee was acting within the scope of employment given a particular set of facts is a question of law subject to plenary review. *Washington v. United States*, 868 F.2d 332, 334 (9th Cir.), *cert. denied*, 493 U.S. 992 (1989). This legal question is one of state law. 28 U.S.C. § 1346(b)(1988); *Schrob*, 967 F.2d at 934. Thus, Pennsylvania law governs here.

In *Butler v. Flo-Ron Vending Co.*, 557 A.2d 730, 736 (Pa. Super.), *appeal denied*, 567 A.2d 650 (1989), the Pennsylvania Superior Court adopted the general standard set forth in Restatement (Second) of Agency § 228 for determining whether an employee's conduct is within the scope of employment. In the absence of any contrary decisions or pronouncements by the Supreme Court of Pennsylvania, we predict that that court would follow this holding. *See Northern Ins. Co. v.*

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Aardvark Assoc., 942 F.2d 189, 193 (3d Cir. 1991). Moreover, we will presume that the Supreme Court of Pennsylvania would also follow related provisions of the Restatement (Second) of Agency, including Section 247, which directly addresses an employer's liability for defamatory statements made by an employee.

Applying the standards set out above, we cannot sustain the decision of the district court. It is not entirely clear whether the district court employed a procedure analogous to summary judgment or whether it made findings regarding what it viewed as genuine issues of material fact. In any event, the district court did not discuss the facts relating to each of the individual defendants. Moreover, the court's short discussion appears to have been based on legally erroneous premises.

The court apparently reasoned that an employee's conduct cannot be within the scope of employment if the employer instructed the employee not to engage in that conduct. Thus, the district court observed that Medical Center employees could not have been acting within the scope of their employment in discussing the reason for Aliota's removal because the Medical Center director had instructed employees to refer all questions concerning this matter to him. This reasoning is directly contrary to the rule set out in Restatement (Second) of Agency § 230, which states: "An act, although forbidden, or done in a forbidden manner, may be within the scope of employment."

In a similar vein, the district court apparently reasoned that Kathryn Fowells was not acting within the scope of her employment when she allegedly made defamatory statements about Aliota

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to Nies, a manufacturer's representative, because her job description called for her to provide "factual information" to such representatives. The court wrote (emphasis in original):

> The allegations of this lawsuit do not state that [Fowells] passed on *factual* information. This case is a defamation action! Therefore, we conclude the alleged conduct of the individual defendants was not conduct that they were employed to perform.

This reasoning conflicts with Restatement (Second) of Agency § 230, which was discussed above. It also conflicts with comments to Restatement (Second) of Agency § 247, which deal specifically with defamation. One of these comments states:

> If the master employs a servant to speak for him, he is subject to liability if the servant makes a mistake as to the truth of the words spoken or as to the justification for speaking them, or even if he speaks with an improper motive, provided that he acts at least in part to serve his employer's purposes. The master may be liable even though the servant knows the statement to be untrue. . . .

Restatement (Second) of Agency § 247, cmt. c. *See also id.* cmt. a.[7]

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7. This comment states:

> If the scope of employment of a servant includes the making of statements concerning others which he believes to be true and privileged, the master is subject to liability for untrue and unprivileged defamatory statements made by the servant concerning such others, if the statements are otherwise within the scope of the servant's employment.

In light of what we have said, we must vacate the decision of the district court. We will remand this case for a redetermination whether, in accordance with the procedures and standards we have set out, the originally named individual defendants were acting within the scope of their employment when they allegedly made defamatory statements.

Restatement (Second) of Agency § 247, cmt. a.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3757 and 92-3020

LOUIS J. ALIOTA and PAULETTE ALIOTA,
v.
JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS, JOYCE BALL,
UNITED STATES OF AMERICA,
Appellants in No. 91-3757

IN RE: UNITED STATES OF AMERICA,
JACK D. GRAHAM, WILLIAM D. SHOEMAKE,
KATHRYN FOWELLS, JANET WELLS and
JOYCE BALL,
Petitioners in No. 92-3020

(D.C. Civil No. 90-00244E)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having

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been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Samuel A. Alito
Circuit Judge

DATED: Feb. 18, 1993

AJA

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-1863

In the Supreme Court of the United States

OCTOBER TERM, 1993

LOUIS J. ALIOTA AND PAULETTE ALIOTA, PETITIONERS

v.

JACK D. GRAHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
BARBARA L. HERWIG
MALCOLM L. STEWART
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in stating that if the Attorney General certifies that a federal employee was acting within the scope of his employment, the federal district court may not remand to state court a tort action against that employee.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1863

LOUIS J. ALIOTA AND PAULETTE ALIOTA, PETITIONERS

v.

JACK D. GRAHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A36) is reported at 984 F.2d 1350. The opinion of the district court (Pet. App. A1-A14) is not reported.

JURISDICTION

The court of appeals entered its judgment on January 22, 1993, and it denied a petition for rehearing on February 18, 1993. Pet. App. A37-A38. The petition for a writ of certiorari was filed on May 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. As a practical matter, the Westfall Act provides immunity to government employees acting within the scope of their employment by requiring that the United States be substituted as the defendant and that the suit proceed against the government under the Federal Tort Claims Act (FTCA), see 28 U.S.C. 2671 *et seq.* The Westfall Act states in relevant part:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively

> establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d). The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1).

As the quoted passage indicates, the Westfall Act provides that when the Attorney General or his designee certifies in a suit filed in state court that the employee has acted within the scope of his employment, the suit "shall be removed * * * at any time before trial" to federal court. 28 U.S.C. 2679(d)(2). Prior to the passage of the Westfall Act, the FTCA authorized a district court to remand a removed case if the court determined that the federal employee had not acted within the scope of his employment. See 28 U.S.C. 2679(b) and (d) (1982 & Supp. V 1987). The Westfall Act partially repealed that statutory remand authority by providing that the Attorney General's scope certification "shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). The Act continues to vest the district court with the power to remand in cases in which the Attorney General does not issue a scope certification. See 28 U.S.C. 2679(d)(3).

2. From 1980 until 1989, petitioner Louis J. Aliota served as chief of the pharmacy at the Veterans Affairs Medical Center in Erie, Pennsylvania. In 1990, he and his wife, petitioner Paulette Aliota, filed suit in state court against five of Mr. Aliota's former co-workers, who are the private defendants (and respondents) in this case. Petitioners alleged that the defendants had made defamatory statements about

Mr. Aliota. The defendants filed a notice of removal to federal district court, and the United States Attorney for the Western District of Pennsylvania certified that the five had acted within the scope of their employment when they allegedly made the statements in question. The district court ordered that the United States be substituted as the sole defendant in the case. Petitioners moved to resubstitute the individual defendants, arguing that the alleged tortious acts had not been committed within the scope of their employment. Pet. App. A17-A18.

The district court ultimately granted petitioners' motion, concluding that the acts alleged did not fall within the scope of the defendants' employment. The court acknowledged that the defendants' duties included "[f]actual exchange of information" with persons outside the VA. Pet. App. A8. The court continued, however, that "[t]he allegations of this lawsuit do not state that the original defendant passed on *factual* information. This case is a defamation action! Therefore, we conclude the alleged conduct of the individual defendants was not conduct that they were employed to perform." *Id.* at A9. After concluding that the acts alleged were not within the scope of the defendants' employment, the court struck the substitution of the United States and ordered the case remanded to state court. *Id.* at A12-A13.

The court of appeals reversed. The court held that the resubstitution of the individual defendants was reviewable on appeal, Pet. App. A19-A23, and that the district court's disposition of the scope-of-employment issue "appears to have been based on legally erroneous premises," *id.* at A34. Specifically, the district court had "apparently reasoned that an employee's conduct cannot be within the scope of

employment if the employer instructed the employee not to engage in that conduct." *Ibid.* The court of appeals vacated the district court's decision and remanded "for a redetermination whether, in accordance with the procedures and standards we have set out, the originally named individual defendants were acting within the scope of their employment when they allegedly made defamatory statements." *Id.* at A36.

The court of appeals also held that, regardless of the district court's resolution of the scope of employment issue, the district court lacked authority to remand the case to state court after the United States Attorney's scope-of-employment certification. The court explained that

> when a tort suit against a federal employee is filed in state court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous. We believe that this conclusion is dictated by the plain language of 28 U.S.C. § 2679(d)(2)(1988) stating that the Attorney General's certification "shall *conclusively* establish scope of office or employment *for purposes of removal.*"

Pet. App. A27-A28 (emphasis added by court of appeals). The court further noted that if 28 U.S.C. 2679(d)(2) were interpreted to permit remand in this situation, the quoted language "would be essentially meaningless." Pet. App. A28.

DISCUSSION

Petitioners challenge the court of appeals' determination that once the Attorney General or his designee makes a scope-of-employment certification under the Westfall Act, a district court may not remand the case to state court, even if the district court disagrees with the scope certification and resubstitutes the individual defendant. Petitioners correctly note that this aspect of the court of appeals' decision conflicts with language in other court of appeals opinions. As we explain below, however, the case presents an inappropriate vehicle for this Court's resolution of the issue. Moreover, the court of appeals' holding is compelled by the plain language of the statute and is consistent with constitutional limitations on the jurisdiction of the federal courts. The petition should therefore be denied.

1. The court of appeals' decision in this case is inconsistent with language in *Nasuti* v. *Scannell*, 906 F.2d 802 (1st Cir. 1990). In *Nasuti*, the Attorney General had certified that the defendant was acting within the scope of his federal employment. The principal question in that case was whether the district court had authority to resubstitute the individual defendant and remand the case to state court, because an exception to the FTCA made relief against the United States unavailable. 906 F.2d at 810. The First Circuit ruled that the district court was required to decide the scope-of-employment issue itself, *ibid.*, and to dismiss the suit entirely if it determined that the scope certification was proper. *Id.* at 814. Accord *United States* v. *Smith*, 499 U.S. 160 (1991). The First Circuit also stated, however, that "[i]f the district court finds that Scannell was

acting *outside* the scope of his employment, it shall remand the case back to the state superior court." 906 F.2d at 814 (emphasis in original).

The court of appeals' decision in this case is also inconsistent with language in *Green* v. *Hill*, 968 F.2d 1098, modifying 954 F.2d 694 (11th Cir. 1992). The Eleventh Circuit addressed the consequences of a Westfall Act substitution in an assault and battery action, concluding:

> If the district court finds that the assault and battery occurred within the scope of Hill's employment, it must dismiss this case. If it finds that the acts occurred outside the scope of employment, it is within the district court's discretion to continue its jurisdiction over the case and adjudicate the controversy. On the other hand, the court may elect to remand the assault and battery issue to the state court.

968 F.2d at 1098-1099.

Neither the First Circuit nor the Eleventh Circuit devoted extensive analysis to the question presented here. In particular, neither court attempted to explain how a remand to state court in this setting could be reconciled with the Westfall Act's command that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2).[1]

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[1] Petitioners also contend that the decision below is in conflict with *Snodgrass* v. *United States*, 957 F.2d 482 (7th Cir. 1992), and *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538 (1990), modified, 924 F.2d 1555 (11th Cir.), cert. denied, 112 S. Ct. 62 (1991). That contention is incorrect. In *Snodgrass*, the United States Attorney *refused* to issue a scope certification, see 957 F.2d at 484; in that situation remand is

2. Although this Court may ultimately find it necessary to resolve the conflicting views on the issue presented here, the petition for a writ of certiorari in this case should be denied.

As an initial matter, this case currently is in an interlocutory posture. The court of appeals reversed the district court's determination that the individual defendants had not acted within the scope of their employment and remanded the case to the district court to redetermine that issue under the correct legal standards. See Pet. App. A22. If the district court concludes that the individual defendants were acting within the scope of their employment, the court will not reach the question whether a remand to state court is appropriate. If the district court instead disagrees with the scope certification and resubstitutes the individual defendants (and if petitioners are dissatisfied with the outcome of the ensuing trial), petitioners may renew their jurisdictional challenge on appeal and, if necessary, in a subsequent petition for a writ of certiorari. In either event, the case is not ripe for review by this Court. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see also *Virginia Military Institute* v. *United States*, No. 92-1213 (May 24, 1993) (opinion of Justice Scalia respecting the denial of the petition for a writ of certiorari).

The Court's usual practice of awaiting a final judgment in the lower courts is especially pertinent

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unquestionably appropriate. See 28 U.S.C. 2679(d)(3). In *S.J. & W.*, the language in the original panel opinion that authorized remand to state court was deleted in response to the government's rehearing petition. See 924 F.2d at 1555.

here, because petitioners did not give the court of appeals panel a full opportunity to consider the argument that they present in this Court. Petitioners principally contend that the court of appeals' interpretation of 28 U.S.C. 2679(d)(2) is inconsistent with constitutional limitations on the jurisdiction of the federal courts. See Pet. 4-8. That argument, however, was presented to the court of appeals only in the suggestion for rehearing en banc petitioners filed after the panel had issued its decision. Prior to the panel's decision, petitioners had argued that the district court's remand order was unreviewable—a contention that the court of appeals rejected and that petitioners do not press in this Court. Petitioners also relied on *Nasuti* in arguing that the district court had acted properly in remanding the case after it concluded that the scope certification was incorrect. Petitioners did not contend, however, that the Constitution would prohibit the district court from retaining jurisdiction after resubstituting the individual defendants. Nor did they cite *Mesa* v. *California*, 489 U.S. 121 (1989), the case on which they principally rely in their petition for certiorari. Because petitioners' constitutional argument was neither presented to nor addressed by the court of appeals, this Court should not consider it. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).[2]

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[2] See also, *e.g.*, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945) (Supreme Court ordinarily will not consider issue raised for the first time in rehearing petition filed in highest state court unless state court expressly decided the question).

Finally, the decision of the court of appeals is correct. The plain language of the Westfall Act requires that the case remain in district court once the Attorney General or his designee issues a scope certification. Section 2679(d)(2) states that upon the issuance of a scope certification by the Attorney General, a suit against an individual federal employee "shall be removed" to federal district court, and "the United States shall be substituted as the party defendant." Those provisions make clear that any request to resubstitute the individual defendants must be addressed to the federal rather than the state court.[3] But regardless of the disposition of such a request, the Westfall Act's additional provision that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal" prevents a remand to the state court. The last sentence of 2679(d)(2) would be superfluous if it did not mean what it says: the Attorney General's scope certification shall be the final word in determining whether the defendants are entitled to a federal forum.[4]

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[3] But see *Johnson* v. *Carter*, 983 F.2d 1316 (4th Cir. 1993) (en banc), petition for cert. pending, No. 92-1591 (filed Apr. 1, 1993) (holding that the Attorney General's certification is not subject to judicial review).

[4] This reading of Section 2679(d)(2) is supported by Section 2679(d)(3), which addresses the situation in which the Attorney General has refused to certify that the defendant was acting within the scope of his employment. The employee may contest the Attorney General's refusal to issue a scope certification, and the case may be removed to federal court for consideration of the scope-of-employment issue. Section 2679(d)(3) provides that "[i]f, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding

Article III of the Constitution does not prevent Congress from allowing a case such as this one to proceed in federal court, even if the district court rejects the Attorney General's scope certification. Petitioners' complaint alleges that federal employees committed a tort, and the Attorney General has determined that the employees are entitled to substitution under the Westfall Act, which extends substantive protections to federal employees. Thus, this case does not involve merely "a state law claim between two private citizens which does not implicate any law or interest * * * of the United States." Pet. 7. Congress's conferral of federal rights under the Westfall Act provides a constitutionally sufficient basis for federal jurisdiction, even if the federal court ultimately determines that substitution is not available to these particular defendants and that state law provides the rule of decision. See generally *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 491-497 (1983) (presence of foreign sovereign immunity issue furnishes constitutional basis for federal jurisdiction).[5]

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shall be remanded to the State court." The absence of a similar provision governing cases in which the district court disagrees with the Attorney General's scope certification further suggests that remand is impermissible in that context. See Pet. App. A28-A29.

[5] As this case illustrates, a district court's preliminary rejection of the scope certification usually will not definitively resolve the defendant's claim to immunity. In this instance, the district court rendered its decision on the scope-of-employment issue based on the allegations contained in petitioners' complaint. See Pet. App. A9. Even if the district court in this case adheres to that ruling on remand from the court of appeals, its decision would not foreclose the possibility of a

Petitioners' reliance on *Mesa* v. *California*, 489 U.S. 121 (1989), is misplaced. The Court noted in that case that the federal statute allowing removal of suits against federal officers acting "under color of such office" (28 U.S.C. 1442(a)) envisions removal only when the defendant asserts a colorable federal defense, 489 U.S. at 135, and the Court suggested that a statute permitting removal of *any* lawsuit filed against a federal employee could raise serious constitutional difficulties, *id.* at 136-139. The Westfall Act does not pose that potential difficulty. The Attorney General's scope certification under Section 2679(d)(2) establishes that the federal employee in question has a legitimate federal defense under the Westfall Act. To be sure, the district court may ultimately disagree with the Attorney General's certification. But the certification certainly establishes, at a minimum, that the defense is "colorable." By contrast, Congress has expressly provided for a remand in cases where *both* the Attorney General *and* the district court have determined that the individual defendant was not acting within the scope of his employment. 28 U.S.C. 2679(d)(3). See note 4, *supra*.

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different result following discovery or after trial. The court of appeals therefore properly required final disposition of that issue in the federal forum. Cf. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993) ("the jurisdiction of the Court depends upon the state of things at the time of the action brought"); *Republic National Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (subject matter jurisdiction "survives a change in circumstances").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

BARBARA L. HERWIG
MALCOLM L. STEWART
Attorneys

JULY 1993